HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Arbitration Case No.: 44 of 2004
And
OMP(M) No.: 78 of 2001.
Reserved on: 17.8.2007.
Decided on: 27.8.2007.

State of Himachal Pradesh ……Petitioner.

Versus

D.P. Communication System Pvt. Ltd. ……Respondent.

Coram:

The Hon'ble Mr.Justice V.K. Ahuja, Judge.

Whether approved for reporting? No.

For the petitioner/objector: Mr.Ashwani K.Sharma, Advocate.

For the claimant/Non-objector: Mr.Ajay Mohan Goel, Advocate.

V.K. Ahuja, J:

This Judgment shall dispose of the petition filed under Section 34 of Arbitration and Conciliation Act, 1996 by petitioner/State of H.P. against the interim award dated 29th May, 1998, passed by the sole Arbitrator. This judgment shall also dispose of the objections filed by the State of Himachal Pradesh/objector against the final award passed by the sole arbitrator Mr. Justice S.K. Jain on 27.4.2001.

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1. Whether reporters of Local papers may be allowed to see the judgment? Yes.

Briefly stated the facts of the case are that the Government of Himachal Pradesh intended to establish an 'ON LINE LOTTERY'. It accepted the proposal in principle of D.P. Communication/respondent to act as sole selling agent for establishing the "ON LINE LOTTERY GAMES" for it on a "TURN KEY" basis for the whole of India and issued authorization letter, dated 28.10.1994, in favour of the respondent. In pursuance of the said letter of authorization, the Government of Himachal Pradesh, through its Directorate of H.P. State Lotteries (hereinafter referred to as HPSL), entered into an agreement, dated 31.1.1995, with the respondent/D.P. Communication (for short DPC), thereby appointing them its sole and exclusive agent to assist it in establishing the "ON LINE LOTTERY SYSTEM" in the State of H.P. and also to assist it in the operation and management of the "ON LINE LOTTERY SYSTEM" within the Union of India in accordance with the terms and conditions covenant therein. On 9.10.1995, DPC released a bank draft for a sum of Rs.5.00 crores in favour of HPSL.

It was further alleged that thereafter in February, 1996, the Director of HPSL sought permission of several State Governments to sell their "ON LINE COMPUTERISED LOTTERY TICKETS" in their States/UT. On 15.6.1996, HPSL informed DPC that some States have asked for some information which has been sent and applications to the remaining States have also been sent. DPC was requested to pursue the applications for permission of the concerned States so as to make the system functional within the time limit fixed to give a start to the Scheme and they were also informed that the State Government was persuading these States to expedite their permission. On 1st August, 1996, DPC informed HPSL that they had not received any formal approvals from various States which may delay the project. On 23.2.1996, DPC forwarded a roll out plan and brought

it to the notice of HPSL that they will work according to the said plan in the year "One" and that on the start up date (1st February, 1997), the number of terminals would depend upon the approval of the other States. According to the State Roll Out Plan, 2500 terminals and 1765 outlets have to be installed in the first year in the State of H.P. and other States.

On 24th February, 1996, DPC notified the items required and also informed that the required plan was subject to approvals of other States and the HPSL, who agreed to their schedule for installation of equipment as well as the roll out plan, dated 23.2.1996. On 2.4.1996, DPC requested the HPSL to persuade 14 States for immediate approval and also notify about the logo to be printed on the computerized ticket rolls and also informed about the progress of the system on 23rd October, 1996. On 21.11.1996, the DPC thanked HPSL for showing three sheds at Parwanoo for installation of the data centre.

Some correspondence took place in between the parties. However, on 2.1.1997, HPSL cancelled the agreement, dated 31.1.1995, since it decided to float global tenders of the on line lotteries. DPC was offered to take part in the global tenders when the same were invited and in that event, the amount of Rs.5.00 crores deposited by the DPC shall be adjusted against the tender deposit. It was further alleged that the DPC moved an application under Section 9 of the Arbitration Act, 1996 restraining the HPSL from implementing their letter of cancellation and from going ahead with the global tender and following order was passed by this Court on 7.2.1997:

> *".....Accordingly, it is ordered that the State is at liberty to float the Global Tenders regarding On-Line Lotteries, to negotiate and finalize the terms thereof, but would not execute and sign the contract till the matter is finalized in the arbitration proceedings by the Arbitrator in terms of the agreement dated 31st January, 1995 entered into between the parties or otherwise between them.*

It is further made clear that in the Global Tender, which will be floated by the State, it would be clearly stated that the execution and signing of the final contract between the successful tenderers and the State will be subject to the decision of the pending lis between M/s D.P. Communication System (P) Limited and the State of Himachal Pradesh……"

The HPSL sought review of the order, which was dismissed. The DPC then moved arbitration petition for appointment of an Arbitrator and the Chief Justice, vide his order dated 3.5.1997, appointed Mr.Sushil Kumar Jain, a former Judge, as the Arbitrator to decide the matter, who issued notices to the parties, held sittings and both the parties led evidence on the following points/issues:

"*1. Whether the termination of the contract dated 31.1.1995 by the Respondent is valid? OP DPC*

2(a) If issue No.1 is proved, whether the claimant is entitled to restoration of the original contract with damages for the intervening period and if so, what is the quantum of damages? OP DPC

2(b) If restoration of agreement is not possible or viable on the date of the award, whether the claimant is entitled to the claims as laid down in the claim petition? OP DPC

3. If issue no.1 is not proved, whether the claimant is entitled to the refund of the deposit of Rs.5.00 crores deposited in terms of clause 4 of the agreement and to payment of interest thereon, and if so, its quantum? OP DPC.

4. Whether the claim of the respondent is beyond the scope of the arbitration reference, and if so, its effect? OP DPC.

5. If issue no.4 and 1 are not proved, whether the claimant has committed a breach of the contract dated 31.1.1995? If so, whether the respondent is entitled to damages, and if so, what is its quantum? OP HPSL.

6. If issue No.1 is proved, whether the respondent has adversely affected the claimant's ability to perform its part of the obligation under the agreement? OP DPC.

7. Whether at the time of negotiations and subsequent thereto Dr.Manmohan Singh Palli and Mr.Davey Baldev Raj, who were Directors of D.P. Communications System Private Limited, Amritsar, at the relevant time, had personally held

out that they had the entrepreneurial skill to manage the ON-LINE LOTTERY SYSTEM, and if so, whether they are necessary and proper parties to the claim petition? OP HPSL.

8. Whether the claim petition is not maintainable as alleged in the reply, additional reply and rejoinder? OP HPSL.

9. Whether time was the essence of the contract and the claimant failed to start the ON LINE LOTTERY within the time schedule, and if so, its effect? OP HPSL."

The Arbitrator entered into the reference after giving an opportunity to the parties to file their evidence/affidavits and considered the various clauses of the agreement and referred to the various terms used in the agreement or in communications in between the parties. The Arbitrator, in its interim award, had referred to the various preliminary objections raised before it and had given his findings on them.

In regard to issues framed by the Arbitrator, as mentioned above, the Arbitrator gave his findings as under:

On First Issue:

The cancellation of the agreement of HPSL was in clear contravention of the terms of the agreement which both the parties had confirmed to be valid and binding upon them vide clause 29.4. Therefore, the cancellation was held to be invalid.

On Second Issue:

The claim of restoration of the contract was rejected. However, it was observed that it is a contract for non-performance whereof the aggrieved party can be compensated by payment of damages in terms of money. Therefore, the claim of restoration of the agreement was rejected. In regard to the question of

damages for the intervening period and other claims, it was held that these will be decided at the time of final award.

On Third Issue:

It was held that while canceling the agreement, the HPSL have shown their intention to refund the cash deposit of Rs.5.00 crores to DPC by offering it to take part in the global tender and for adjusting the amount against the tender deposit. However, the contract was unilaterally cancelled which cancellation was held to be unjustified and, therefore, DPC was held entitled to the refund of the cash deposit of Rs.5.00 crores. However, the question of interest on this amount was left open to be decided at the time of final award.

On Fourth Issue:

It was held that the counter claim put up by the respondent/State is not beyond the scope of arbitration reference. However, it will be dealt with at the time of passing of the final award.

On Fifth Issue:

It was held that this will be determined in the final award.

On Sixth Issue:

It was held that it will be dealt with in the final award.

On Seventh Issue:

It was held that Dr.Manmohan Singh Palli and Mr.Davey Baldev Raj, were neither necessary nor proper party to the claim petition.

On Eighth Issue:

It was held that Mr.David Too was competent to sign and institute the statement of claim before the Arbitrator.

On Ninth Issue:

It was held that that the time was not the essence of the contract.

Accordingly, the interim award was passed by the Arbitrator in view of his findings on the various issues, as mentioned above, and the crux of the matter is that respondent/State was directed to pay the amount of Rs.5.00 crores to the claimant-Company.

After interim award was announced the arbitrator proceeded to record evidence including the documentary and after considering the claim of both the parties, he gave his final findings on the issues, mentioned above, as under:

(i) A lump sum amount of Rs.25.00 lacs as damages is allowed to DPC against HPSL with future interest at the rate of 18% per annum from the date of the award till actual payment. DPC was held entitled to receive interest on the amount of Rupees 5.00 crores as under:

(a) 12% per annum w.e.f. 2.1.1997, the date on which the agreement was cancelled till 21.6.1997, the date on which the parties had appeared before the arbitrator;

(b) Pendent elite interest w.e.f. 22.6.1997 to 29.5.1998, the date of the interim award, at the rate of 12% per annum; and

(c) Future interest w.e.f. 30.5.1998 till actual payment at the rate of 18% per annum.

It was also held that other claim put forwarded by the HPSL and the counter claim put forwarded by HPSL are declined in toto. It was held that the claimant did not commit any breach of the contract dated 31.1.1995.

Objections were filed by the petitioner/State of H.P. raising various pleas and reply to the objections were also filed by the respondent. On the pleadings of the parties, the following issues were framed by this Court on 21.3.2005:

"1. *Whether there was no valid claim on behalf of the respondent before the Arbitrator. If so, its effect? OPP*

2. *Whether in view of clause 39 of the agreement, the claims filed by the respondent before the Arbitrator were not arbitrable? OPP*

3. *Whether the petitioner is estopped from raising an objection as to clause 39 of the agreement, as alleged? OPR*

4. *Whether the arbitral procedure leading to the impugned award by the arbitrator was not in accordance with the provisions containing in Part-I of the Act or in accordance with the agreement of the parties, as alleged and the award is liable to be set aside under Section 34(2)(a)(v) of the Act? OPP*

5. *Whether the petitioner was under some incapacity in view of the order dated 3.5.1998 of the Arbitrator. If so, to what effect? OPP*

6. *Whether the Arbitral award is in violation of the laws of India as mentioned in the petition and is liable to be set aside being in conflict with the public policy of India in terms of Section 34(2)(b)(ii) of the Act? OPP*

7. *Whether the reply filed by the respondent to the application under Section 34 of the Act has been filed by a competent and duly authorized person. If not, to what effect? OPR*

8. *Relief."*

Aggrieved by the final award passed by the Arbitrator, the petitioner/State of H.P. filed objections under Section 34 of the Arbitration Act on the main ground that the arbitrator in awarding interest on Rupees 5.00 crores with the arbitral procedure leading to the award by the Arbitrator which was not

in accordance with the provisions of law. The arbitrator wrongly held that the letter inviting global tenders created a vested right in the respondent since the respondent have no fundamental right to carry on the trade of lotteries. The award of interest is contrary to law and public policy which is in the nature of damages at the rate of 18% and cannot be awarded.

Reply to the objections were filed by the respondent who denied the assertions made by the petitioner/objector in their objection petition and submitted that the award was passed by the arbitrator in accordance with law and it was not against the public policy and the objection petition is liable to be dismissed.

A perusal of the record of the case shows that an application for consolidation of this case was filed for its consolidation alongwith the arbitration case No. 44 of 2004 mentioned above which was an objection petition filed by the petitioner/State of H.P. against the interim award passed by the arbitrator. Both the cases were directed to be taken up together and as such, this judgment shall dispose of both the cases by way of this common judgment.

The following issues were framed on 22.7.2002 in second case:

"1. Whether the award dated 27.4.2001 is liable to be set aside on the ground stated in the objection petition? OPO

2. Relief."

The evidence in the form of affidavit was filed by the petitioner and respondent, but the same are not relevant since this Court is not required to give findings on the facts, as alleged by the petitioner as those findings were required to be given by the Arbitrator which have been given by him.

I have heard the learned counsel for the parties. My findings on these issues framed in the first case as well as in the second case are as under:

I will take up briefly the objections filed by the petitioner to the interim award as well as final award passed by the Arbitrator and replies of the respondent as also the written arguments filed by both the parties in support of these objections. The first objection raised by the objector/petitioner-State was in regard to the recourse to passing of interim award and final award by the Arbitrator. However, in the written arguments, the petitioner had himself referred to the provisions of Section 2(c) of the Arbitration Act, 1996, which clearly provides that arbitral award includes the interim award. Once there is a provision for passing of the interim award before passing of the final award and the Arbitrator had resorted to this provision, the objections raised by the petitioner are not tenable. The next plea taken by the petitioner was in regard to the competency of one Shri Bharat Bhushan Manwani to file reply and to contest the application as well as in regard to the constitution of M/s D.P. Communication System and the authority of Mr.David to pursue the litigation before the Arbitrator as well as before this Court.

I may mention herewith that a perusal of the awards passed by the Arbitrator will show that he had considered these pleas and had referred to the documentary evidence led on record by both the parties. If I may make the observation in clear terms, the facts of the case will show that the State Government was in a hurry to sign the agreement on the basis of the representation made by two persons, namely, Dr.Manmohan Singh Palli and D.Baldev Raj and at many places in the objections it was alleged that the application was submitted by the persons on a plain paper and not even on the

writing pad of the Company. It was for the State Government to have considered the status of the persons making the representation, the viability of the Company, its financial position and as also the composition of the Company as to who were the persons who could be said to be authorized to make representation to the State Government on behalf of the Company. However, without caring to look into these basic questions which were very necessary before an agreement was entered with the State Government, but the State Government appeared to be in a hurry and without verifying all these facts, they proceeded to enter into a contract with the Company which matter had to be looked into by the State Government itself. However, the fact remains that an agreement was entered into on behalf of the Company, the earnest money was also deposited and, therefore, these questions do not arise at this stage as to who was competent to raise objections before the Arbitrator and the questions raised before the Arbitrator have been duly considered by the Arbitrator and as such this plea is liable to be repelled being devoid of any force and the same is repelled accordingly. This plea is also not open to the petitioner/State as to who was competent to file objections on behalf of the Company since these have been filed on behalf of the Company and in case there is inter se dispute as to who was entitled to the return of the amount on behalf of the Company, it was a dispute inter se the parties which had to be decided at an appropriate forum if the parties file such a case. However, in so far as the amount is concerned, the respondent-Company is entitled to the amount which was deposited by it.

The learned counsel for the respondent had relied upon the decision of the Apex Court in **Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 Supreme Court Cases 705**, where their Lordships

had considered the jurisdiction of the court to set aside arbitral award under phrase "public policy of India". It was held that the phrase "public policy of India" should be given a wider and not a narrower meaning. Hence, a court can set aside the award if it is (i) contrary to (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (ii) is patently illegal or (iii) is so unfair and unreasonable that it shocks the conscience of the court. However, illegality of a trivial nature can be ignored.

Coming to the next question in regard to the terms of the agreement and authority of termination, the decision has been taken by the Arbitrator that the termination of the agreement was not valid in view of the facts of the case and even though for the arguments sake it is considered that these findings of the Arbitrator are erroneous, these cannot be considered particularly when the Arbitrator had considered this plea and referred to the correspondence placed on the record and in my view, this plea falls squarely on the ground. Once the Arbitrator had come to a definite conclusion that the termination of the agreement entered into in between the parties was not wrong and there is nothing on the record to show that the execution of the agreement was delayed due to any act on the part of the respondent, they were entitled to the refund of the sum of Rs.5.00 crores deposited by them. The facts of the case will clearly show that the petitioner/State of H.P. should have verified firstly if the respondent/Company had a registered office in Himachal Pradesh and in other places where they intend to start On-Line Lottery, whether they had financial viability, who were the Directors of the Company and their competence or expertise to undertake this project. The permission of the various State Governments was also required to execute the agreement for which steps were

taken by the State Government as well as by the respondent, as per evidence, to get the sanction which could not be granted by all the States well in time which resulted in termination of agreement and, therefore, the Arbitrator had rightly come to the conclusion that the respondent was entitled to the refund of Rs.5.00 crores deposited by them.

In so far as the legality of the order passed in regard to the award of the damages to the extent of Rs.25.00 lacs is concerned, the Arbitrator had considered the various pleas raised by both the parties and after considering the evidence, he had awarded this amount as damages. The findings of the Arbitrator, though it may be erroneous for arguments sake, cannot be considered by this Court which is not sitting in appeal to the findings of the Arbitrator and the evidence has not to be re-appreciated by this Court as sought to be argued by the learned counsel for the petitioner. Therefore, the order passed in awarding damages can be said to be legal.

The another plea raised by the learned counsel for the petitioner was in regard to the interest on the amount of Rs.5.00 crores for which a reference was made to the decision of Punjab High Court in Amin Chand Bholanath v. Union of India, AIR 1960 Punjab 179. A perusal of this decision shows that it was held that the award of damages for breach of contract, however, the Arbitrator cannot award interest on it by way of damages. In the present case, the interest is not being awarded in the form of damages but since the earnest money deposited by the respondent was lying with the petitioner for number of years, the interest was accordingly allowed in favour of the respondent to which they were legally entitled, once the agreement has been terminated by the petitioner/State, which termination order has been held to be illegal by the

Arbitrator. I may mention herewith that the learned counsel for the petitioner has not referred to the latest law laid down by the apex court in regard to interest. However, since the decisions of the apex court had come to my notice in another case and these decisions are relevant, they are being referred to.

The decision in **Krishna Bhagya Jala Nigam Ltd. v. G.Harischandra Reddy and another, (2007) 2 Supreme Court Cases 720**, shows that their Lordships had referred to the provisions of Section 31(7) of Arbitration and Conciliation Act, 1996 and in that case, the Arbitrator had awarded interest at the rate of 18% for pre-arbitration period, for pendent lite period and future interest. It was held that it should be reduced to 9% in view of the substantial reduction of interest rate after economic reforms in the country.

The decision in **Bhagwati Oxygen Ltd. v. Hindustan Copper Ltd., AIR 2005 Supreme Court 2071**, was also relied upon in which the Apex Court has referred to the provisions of Section 31 of Arbitration and Conciliation Act and had considered the question of amount of interest. In that case, the interest was awarded at the rate of 18% for pre-reference, pendent lite and post award period. It was observed that the arbitration agreement did not provide for payment of interest. Section 34 of CPC also had no application to arbitration proceedings. However, it was within the power of Arbitrator to award interest for all three stages. It was held that an award deserves no interference and it was also held that the High Court was not right in reducing the rate of interest to 6% and the award was restored.

A perusal of these decisions, particularly in Krishna Bhagya Jala Nigam Ltd. case, shows that the interest can be reduced by the Court which leads to the inference that it would be proper course to be adopted that the interest

should be reduced once it has been granted excessive by the Arbitrator and it is not necessary that the case should be remitted back to the Arbitrator for giving his findings in regard to interest again which will further delay the litigation pending in between the parties.

In the present case, no clause in agreement has been referred to in which it may have been provided that the interest shall be payable to the respondent on the earnest money deposited by them in case of any dispute. I have gone through the final award passed by the Arbitrator. A perusal of the same shows that the Arbitrator had referred to the provisions of Interest Act of 1978 and had also referred to some decisions of the Apex Court before holding that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation call it by any name, interest, compensation or damages. This point was also considered by the Arbitrator if the interest pendent lite can also be granted apart from the interest for the other period. A perusal of this discussion made by the Arbitrator shows that he had very reasonably considered this question of the grant of interest for different periods and had held that the same could be granted by the Arbitrator in view of the powers conferred upon him. However, he has not mentioned the reasons as to why the interest was being granted at the rate of 12% and 18% thereafter though the prevalent rate of interest in the market cannot be said to be this much. Accordingly, once there is no specific provision and the provisions of the CPC, particularly Section 34 of the Act, cannot be said to be directly attracted to the present facts, but keeping in view the decision of the Apex Court, it is clear that the interest can be reduced to such rate of interest as is prevalent at present. In the present case, even if the money had been invested by the State

Government, it would have fetched the interest ranging in between 8.5% to 9.5%, as is being normally paid by the banks for the deposit in fixed deposit accounts. Therefore, the award of the interest, to my mind, beyond 9% cannot be said to be proper and the interest for the different period of award by the Arbitrator deserves to be reduced to 9% to which the respondent shall be entitled for the period granted by him.

In view of the above detailed discussion, it is clear that in so far as the other findings, apart from the interest, are concerned, those findings cannot be said to be against any public policy and the findings have been recorded by the Arbitrator keeping in view the evidence led and as such all the findings recorded by the Arbitrator, which are based upon the pleas raised before it and the documents produced before it, can be said to be such not calling for an interference by this Court on the ground that even if some erroneous view has been taken by the Arbitrator, this cannot be looked into unless and until it was against any law laid down by the Apex Court or these were against any public policy. The award of interest beyond 9% can be said to be against public policy since it was in the form of penal interest which should not have been granted by the Arbitrator and the same is accordingly reduced to 9%.

In view of the above discussion, it is clear that this was not a civil suit in which the findings are required to be given on all points but the objections had to be considered as they lie under Section 34 of the Act and accordingly in view of above discussion, all these issues No.1 to 7 are decided as against the petitioner and in favour of the respondent, while issue No.2 in the second case is partly decided in favour of the petitioner and as against the respondent.

In view of the above, the findings of the Arbitrator are liable to be affirmed and the respondent shall be entitled to the amount deposited by him as awarded by the Arbitrator subject to the condition that the interest award shall be reduced to 9% for the period specified in the award. Objections filed in Arbitration Case No.44 of 2004 are dismissed while objections filed in OMP(M) No.78 of 2001 are partly accepted as detailed above.

In view of the final disposal of the main case, all the pending applications shall also stand disposed of.

August 27, 2007. **(V.K. Ahuja), J.**
(trs)